



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 8, 2011

CBCA 2017

DIAMANTE CONTRACTORS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Johnathan M. Bailey of Bailey & Bailey, P.C., San Antonio, TX, counsel for Appellant.

Peter Fondry, Office of the Solicitor, Department of the Interior, Albuquerque, NM, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **KULLBERG**.

KULLBERG, Board Judge.

Appellant, Diamante Contractors, Inc. (DCI), appealed the assessment of procurement costs and the termination of its contract for default. Respondent, the Department of the Interior (DOI), has moved to dismiss this appeal for lack of jurisdiction. For the reasons stated below, the Board dismisses this appeal for lack of jurisdiction.

Findings of Fact

On September 8, 2007, the National Park Service, an agency within DOI, awarded to DCI contract C1274070054 (contract), construction of multifamily housing at Big Bend National Park, Texas. Appeal File, Vol. 1, Exhibit 2.¹ By letter dated January 6, 2010, the contracting officer (CO) terminated the contract for default due to DCI's failure to maintain adequate performance and payment bonds. Exhibit 1 at 1-2. The CO's letter stated that it was a final decision and advised DCI of its right to appeal the decision. *Id.* On April 6, 2010, the CO issued contract modification 0004. *Id.* at 3-7. Modification 0004 stated, in pertinent part, that "the Government may proceed to purchase the services terminated against your account and [DCI] will be held liable for any excess costs." *Id.* at 3. Modification 0004 contained no language to suggest that it was a decision of the CO that could be appealed nor did it demand the payment of any amount of procurement costs.

DCI filed its notice of appeal with an attached copy of modification 0004 with the Board on May 7, 2010. Its notice of appeal stated the following in pertinent part:

Diamante Contractors, Inc. hereby submits this Notice of Appeal of the attached 4/6/2010 final decision of the Contracting Officer assessing excess procurement costs under the above referenced contract. Pursuant to the Fulford Doctrine, this appeal also encompasses a challenge to the underlying January 6, 2010 final decision terminating the subject contract for default. *Fulford Manufacturing Co.*, ASBCA 2143, et al., 1955 WL 808 (May 20, 1955); *C-Shore International, Inc.* [v. *Department of Agriculture*], CBCA 1697, 10-1 BCA ¶ 34,380.

After the Board's receipt of the appeal file and the parties' pleadings, DOI filed its motion to dismiss this appeal for lack of jurisdiction.

Discussion

DCI argued in its notice of appeal that the *Fulford* doctrine allows it to appeal the assessment of excess procurement costs under modification 0004 and the underlying termination of its contract for default, which was issued more than ninety days before DCI's appeal. In its motion to dismiss for lack of jurisdiction, DOI contended that

¹ All exhibits are in the appeal file, which consists of four volumes, unless otherwise noted.

modification 0004 was not an appealable CO's final decision that assessed reprourement costs. DCI, in response to DOI's motion, has requested that the Board dismiss this appeal without prejudice.

The issue before the Board is whether modification 0004 is an appealable decision of the CO that assessed reprourement costs. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-26 (2011)), states the following in pertinent part:

(d) ISSUANCE OF DECISION.—The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) CONTENTS OF DECISION.—The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

Id. § 7103(d)-(e). “Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.” *Id.* § 7103(a)(3). Modification 0004 did not assess any amount of reprourement costs, and it did not advise DCI of its appeal rights. That modification only mentioned the possibility of a future assessment of reprourement costs of an undetermined amount, and an appeal under such circumstances is premature. *See Job Line Construction, Inc.*, EBCA C-9408177, 95-1 BCA ¶ 27,429, at 136,693 (1994).

DCI's assertion of the *Fulford* doctrine in this appeal is premature. It has been recognized that “*Fulford* established the fundamental precept that when a contract is terminated for default, the contractor may postpone appealing the underlying default termination action until such time as excess costs of reprourement are assessed by the Government.” *Primepak Co.*, GSBCA 10514, 90-3 BCA ¶ 23,280, at 116,754. The *Fulford* doctrine, however, does not apply in this appeal because there is no CO's decision assessing reprourement costs.

Having found that the *Fulford* doctrine does not apply, the Board is presently precluded from hearing DCI's appeal of the termination for default of its contract. The CDA requires that an appeal to a board of contract appeals such as this Board be brought “within ninety days from the date of receipt of a contracting officer's decision.” 41 U.S.C. § 7104(a). A late filing of an appeal, consequently, “divests the Board of jurisdiction to consider the

case on its merits.” *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340. The CO’s decision terminating DCI’s contract for default was issued on January 6, 2010, and DCI’s notice of appeal was filed more than ninety days after receipt. The Board, therefore, has no jurisdiction in this appeal over the termination for default.²

DCI has requested that the Board dismiss this appeal without prejudice. The Board’s rules provide that “[w]hen circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement within 180 calendar days after the date of the dismissal.” Rule 12(d) (48 CFR 6101.12(d) (2009)). A dismissal without prejudice necessarily requires that the Board have jurisdiction in order to reinstate an appeal, but in the absence of jurisdiction in this case, there is no appeal that could be reinstated. The Board’s decision, however, does not prejudice the ability of DCI to appeal a future CO’s decision that assesses procurement costs.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**. Appellant’s request that this appeal be dismissed without prejudice is denied.

H. CHUCK KULLBERG
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

HOWARD A. POLLACK
Board Judge

² DOI also moved to dismiss DCI’s complaint for failure to state a claim for which relief can be granted. In that the Board is dismissing this appeal for lack of jurisdiction, a separate ruling on DCI’s complaint is unnecessary.